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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted]236

VIRGINIA C. SHAFFER, *Appellant,*

vs.

ANITA VALTIERRA, et al.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement On Behalf of Appellant Virginia C. Shaffer

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1557

RONALD JAMES, et al., *Appellants,*

vs.

ANITA VALTIERRA, et al.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement and Brief in Opposition to Motion to Affirm On Behalf of Appellant Virginia C. Shaffer

Appellant Virginia C. Shaffer appeals from the judgment[1] of the United States District Court for the Northern District of California, entered on April 2, 1970 in the case of *Valtierra v. Housing Authority of the City of San Jose, et al.*, No. 52076, enjoining

1. The judgment is attached as Appendix 2. The record has been filed by the appellants other than appellant Shaffer, and the Clerk's office has informed us that a duplicate record accompanying this Jurisdictional Statement is not desired. We have been unable to obtain an index to the record as filed. Hence record references herein are to the title of the document as filed below, except for those documents reproduced in the appendices hereto, as to which we cite the appendix pages.

All emphasis in quotations has been added, unless otherwise noted.

enforcement of Article XXXIV of the Constitution of the State of California, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Appellant Shaffer is a member of the City Council of the City of San Jose, California. As such she is one of the defendants and an appellant. She comes before this Court by counsel separate from the other appellants[2] because, in her belief, the other appellants do not desire the judgment below to be reversed; they seek to utilize the appeal to obtain this Court's affirmance of a decision which would outlaw a provision of the Constitution of California from whose constraints they, as members of the City Council of San Jose, would prefer to be free. The present case is one of two raising the same issue, consolidated below for hearing. In the other, *Hayes v. Housing Authority of San Mateo,* No. C-69-1 RFP, N.D. Cal., defendants did not even put up a token case; they defaulted. Here the defendant Housing Authority of San Jose and those defendants who are members or officers of the Housing Authority have not even appealed. Appellants are members of the City Council of San Jose. Other than appellant Shaffer, they actually wish an affirmance from this Court so that the City of San Jose can float bonds free of doubts created by ignoring the Constitution of California.[3] To this end the appeal was filed just 8 days after the judgment was entered, a jurisdictional statement was hastily filed by the other appellants within another two weeks, and the plaintiff-appellees have already filed a Motion To Affirm.

This appellant therefore unites in the present document both her Jurisdictional Statement and her Brief in Opposition to the Motion to Affirm.

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2. Brought in after the notice of appeal was filed.

3. See their Jurisdictional Statement, at p. 16. By this statement we do not mean to impugn the office of the City Attorney of San Jose, which represents the other appellants. They are constrained to present the case within the limitations of their clients' desires.

OPINION BELOW

The Opinion of the District Court is not yet reported. It is attached as Appendix 1, infra.

JURISDICTION

This is a suit to enjoin the enforcement of a provision of the Constitution of California,—in the words of the complaint, "to invalidate Article 34 of the California Constitution" (Compl. ¶ 1). The jurisdiction of the court below was invoked under 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1983, and the Equal Protection clause of the 14th Amendment[4] (Complt. ¶ 2). A three-judge court was convened under 28 U.S.C. §§ 2281, 2284. Its judgment, granting plaintiffs' motion for summary judgment, declaratory judgment, and *permanent injunction* (App. 2, p. 11a) was entered April 2, 1970. The Notice of Appeal[5] was filed April 10, 1970, in the District Court. This Court has jurisdiction under 28 U.S.C. § 1253, the appeal being from a permanent injunction by a three-judge court against enforcement of or obedience to a provision of a State Constitution. *Dandridge v. Williams,* No. 131, Oct. Term 1969, 38 U.S.L. Week 4277 (April 6, 1970); *Florida Lime & Avocado Growers v. Jacobsen,* 362 U.S. 73 (1960); *A.F. of L. v. Watson,* 327 U.S. 582 (1946).

STATE CONSTITUTIONAL PROVISION INVOLVED

Article XXXIV of the Constitution of California (Cal. Stats. 1951 cxxiv):

> "SECTION 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of

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4. Jurisdiction was also invoked under the Privileges and Immunities and Supremacy Clauses. The court below found the "Supremacy argument unpersuasive" and did not reach the Privileges and Immunity Argument, as it "decides the case on Equal Protection grounds" (App. 1, p. 4a).

5. A copy of the Notice of Appeal is attached as Appendix 3.

the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

"For the purpose of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

"For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

"For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America.

"SEC. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation.

"SEC. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid,

the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby.

"SEC. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith."

STATUTES INVOLVED

28 U.S.C. § 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

28 U.S.C. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

QUESTION PRESENTED

Where a State provides no manner of public housing except low rent housing for persons of low income, does the State Constitution violate the equal protection clause of the 14th Amendment, merely because it provides that no low-rent housing project shall be developed, constructed or acquired by any state public body unless the project has been approved by a majority of the voters in the locality of the project?

STATEMENT OF THE CASE

1. The genesis of Article XXXIV of the California Constitution

"The United States Housing Act of 1937 (42 U.S.C.A. §§ 1401-1430)[6] established a federal housing agency authorized to make loans to state agencies for the purpose of slum clearance and low-rent housing projects. The California Legislature made the benefits of the federal act available to the cities and counties of this state by enacting the Housing Authorities Law * * *.

"The legislation created in each city and county a public housing authority * * *. The exercise of the powers entrusted by the Legislature to these agencies was made subject to the preliminary condition that the local governing body, in each case, must formally resolve that public housing is needed."[7]

On November 7, 1950, the People of the State of California at a general election added Article XXXIV to the State Constitution, providing that no low-rent housing project shall proceed without prior approval by the voters of the locality. What occasioned its adoption was the discovery of a gap in California in the referendum system. The initiative and referendum are integral parts of the distribution of sovereignty in California. Article IV, Sec. 1, of the California Constitution, on the Legislative Department, vesting legislative power, added

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6. Act of Sept. 1, 1937, c. 896, 50 Stat. 888, as amended.

7. The foregoing is quoted from *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 552-53, 219 P.2d 457, 458 (1950).

"but the people reserve to themselves the power to propose laws or amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any Act, or section or part of any Act, passed by the Legislature."

The same section also provides that

"The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law."[7a]

In June 1950 the Supreme Court of California held that the acts of a local governing body and housing authority under the Housing Authorities Act of California relative to applications to the federal housing authority were "executive and administrative," not "legislative", and therefore not reached by the power of referendum. *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 219 P.2d 457 (1950). It was in *immediate* response to this decision that Article XXXIV was adopted by the electorate less than 6 months later. To the mind of the electorate Article XXXIV was not new but a reaffirmance of a policy going back for years.

2. The propriety and reasonableness of the requirement of a vote by the electorate was immediately recognized by Congress

The propriety and reasonableness of a requirement that there be no low rent public housing unless first approved by the electorate so appealed to the Congress of the United States that it almost immediately made it nationwide by the Independent Offices Appropriations Act the next year. The Act of August 31, 1951, c. 376, Title I, 65 Stat. 277 provided:

"Provided further, That the Public Housing Administration shall not, after the date of approval of this Act, authorize

7a. The language of the foregoing provisions was simplified in 1966 but without change of substance.

> the construction of any projects initiated before or after March 1, 1949, in any locality in which such projects have been or may hereafter be rejected by the governing body of the locality or *by public vote,* unless such projects have been subsequently approved by the same procedure through which such rejection was expressed."

The next year Congress repeated the prohibition, in exactly the same language, in the Act of July 5, 1952, c. 578, Title I, 66 Stat. 403. The following year Congress reasserted the policy in the First Independent Offices Appropriation Act of 1954 (Act of July 31, 1953, c. 302, Title I, 67 Stat. 306), thus:

> *"Provided further,* That unless the governing body of the locality agrees to its completion, no housing shall be authorized by the Public Housing Administration, or, if under construction continue to be constructed, in any community *where the people of that community, by their duly elected representatives, or by referendum, have indicated they do not want it,* and such community shall negotiate with the Federal Government for the completion of such housing, or its abandonment, in whole or in part, and shall agree to repay to the Government the moneys expended prior to the vote or other formal action whereby the community rejected such housing project for any such projects not to be completed plus such amount as may be required to pay all costs and liquidate all obligations lawfully incurred by the local housing authority prior to such rejection in connection with any project not to be completed."

3. The basis on which Article XXXIV was submitted to the People of California and adopted by them

The California Constitution (former Art. IV, § 1, ¶ 11) required the Secretary of State before any election to prepare an official pamphlet and distribute it to every voter, containing arguments for and against every proposition to be voted upon. Attached hereto as Appendix 4 is a copy of the portion of the 1950 Ballot pamphlet on Proposition 10, which became Article XXXIV of the State Constitution.

The Argument in Favor of Initiative Proposition No. 10 contained this:

"A 'YES' vote for this proposed constitutional amendment is a vote neither for nor against public housing. It is a vote for the future right to say 'yes' or 'no' when the community considers a public housing project.

"Passage of the 'Public Housing Projects Law' will restore to the citizens of a city, town, or county, as the case may be, the right to decide whether public housing is needed or wanted in each particular locality. Such is not the case at present.

"Time after time within the past year California communities have had public housing projects forced upon them without regard either to the wishes of the citizens or community needs. This is a particularly critical matter in view of the fact that the long-term, multimillion-dollar public housing contracts call for tax waivers and other forms of local assistance, which the Federal Government says will amount to HALF the cost of the federal subsidy on the project as long as it exists.

"For government to force such additional hidden expense on the voters at a time when taxation and the cost of living have reached an extreme high is a 'gift' of debatable value. It should be accepted or rejected by ballot.

"If, on the other hand, certain communities are in such dire need of housing that the cost of long-term subsidization is deemed worth while, local voters, who best know that need, should have the right to express their wishes by ballot.

"In either case, a 'YES' vote for this proposed amendment will strengthen local self-government and restore to the community the right to determine its own future course.

"Furthermore, the financing of public housing projects is an adaptation of the principle of the issuance of revenue bonds. Under California law, revenue bonds, which bind a community to many years of debt, cannot be issued without local approval given by ballot. Public housing and its long years of hidden debt should also be submitted to the voters to give them the right to decide whether the need for public housing is worth the cost."

4. The proposed Housing Project in the City of San Jose and its rejection by the electorate

In 1966 the San Jose City Council resolved that there was a shortage of safe and sanitary dwellings in the city available to persons of low income and that there was need for a housing authority[8]. It then appointed the commissioners for the Housing Authority as provided by California law (Compl., Ex. F).

In 1968, in obedience to Article XXXIV of the State Constitution, the Housing Authority proposed to the voters of San Jose a low-rent housing project to consist of not more than 1,000 units. The measure failed of passage at the election of November 5, 1968 by 57,896 votes to 68,527 (Complt., Ex. G, Pltfs. Request for Admn. ¶ 12)[9].

5. This suit: the complaint

This suit was commenced on August 27, 1969. According to the complaint, plaintiffs are three mothers and their minor children, living in crowded or substandard housing (Compl. ¶¶ 5-8). The Jurisdictional Statement of the other appellants asserts (at p. 2) that this "is a class action on behalf of the poor." That is not correct. The complaint alleged that plaintiffs sued on behalf of a class consisting of "all persons who are citizens of the United States and who are on the waiting list of the Housing Authority of the City of San Jose." (Compl. ¶ 9). But F.R.Civ.P. Rule 23(a) provides that an action may not be maintained as a class action until a determination is made by the court that it may be so maintained. No such detemination was ever sought or made. The action, therefore, is not a class action.

Named as defendants are the Housing Authority of San Jose, its Executive Director and Commissioners, the City Council of

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8. Pltfs. Request for Admn. attaching Resolution No. 28614, admitted by defendants.

9. Taxpayers' revolt in California has been statewide; few proposals for bonded indebtedness have surmounted the general concern over mounting taxes.

San Jose and its members, including appellant Virginia C. Shaffer (Request for Adm. ¶¶ 15, 18).[10] After mingled statements of law, fact, and conclusion under the captions "The Public Housing Program in California" and "Public Housing in San Jose", the complaint contained three counts for declaratory relief and injunction. The first claimed a denial of equal protection of the laws, and it is the only count on which the court below based its judgment (See fn. 4, p. 3; supra). The prayer is for a declaration that Article XXXIV is void, for a mandatory injunction enjoining defendants "from refusing to proceed with the necessary steps leading to the construction of the 1,000 public housing units proposed by the Housing Authority of the City of San Jose in 1968 . . ." and for an injunction against ". . . enforcing, following[,] abiding by or relying on any of the provisions of Article 34 of the California Constitution."

Welcoming the suit as a means of being released from the obligation of their official oath to the State Constitution, the defendant members of the Housing Authority freely admitted allegations of the complaint. The answer filed by the City Attorney for the defendant City councilmen, including appellant Shaffer, denied material allegations of the complaint.

6. The record in the case

The record consists of the pleadings, affidavits attached to the complaint, responses to a request by plaintiffs for admission, certain additional affidavits, and a Stipulation of Fact. *There was no trial.* On that record plaintiffs moved for summary judgment. The record consists of the following alone:

(a) Identification of the plaintiffs, the kind of housing in which they live, the rent they pay, their income, and what

10. The complaint also purports to name as defendants the United States Department of Housing and Urban Development and Secretary Romney. They were dismissed on motion (App. 1, pp. 3a, 4a).

they receive from public welfare authorities (Compl. Ex. A, B, C).

(b) An admission that the Housing Authority of San Jose "will not make application to HUD for a preliminary loan," and the City Council will not approve such an application or any construction contract for public housing, "until the proposal has been approved by the electorate in accordance with Article 34" (Pltfs. Request for Admn. ¶¶ 16, 19, 20).

(c) Affidavits of an employee of the Planning Department of Santa Clara County (in which San Jose is located) that there is a shortage of low-cost housing in that county, and that rents are increasing, with the opinion that lack of adequate housing correlates with low income and minority status (Lockfeld Aff.), and an affidavit of an employee of the San Jose City Planning Department that in his opinion low income is the factor most highly correlated with substandard housing (Wells Affdvt.)

(d) A *Stipulation of Fact* that housing for rental to persons of low income (as defined by Article XXXIV of the California Constitution) is the only kind of public housing in California, except for housing for state officials and state university personnel and housing incidentally acquired and temporarily held in connection with eminent domain proceedings. A copy of the stipulation is attached as Appendix 5.

7. The motion for summary judgment and the decision below

Upon this bare and sparse record,[11] plaintiffs moved for summary judgment and the District Court granted the motion. It declared that "Article XXXIV of the California Constitution

11. The District Court consolidated this case with the *Hayes* case arising from San Mateo County; and it disposed of the two together. No defense was made in the *Hayes* case.

is * * * unconstitutional and shall have no further force and effect" under the Equal Protection Clause of the 14th Amendment, and it enjoined the defendants "from abiding by or relying upon Article XXXIV as a reason for not requesting state or federal assistance with which to finance low income housing." (App. 2).

Obviously, the District Court declared Article XXXIV to be unconstitutional on its face, as an abstract textual conclusion reached by laying Article XXXIV alongside the 14th Amendment, for no other facts in the record were relevant to its conclusion. The facts identifying plaintiffs bear only on standing to sue. The affidavits of the employees of the Santa Clara and San Jose planning departments state no more than that there is a need for low-cost housing.

The District Court placed its chief reliance on *Hunter v. Erickson*, 393 U.S. 385 (1969). Deciding the case solely on Equal Protection grounds, it said: "The gravamen of plaintiffs' Equal Protection claim is that the *express discrimination in Article XXXIV*, as it applies only to 'low-income persons', brings it squarely within the ban of a long line of Supreme Court decisions forbidding the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective." (App. 1, p. 5a)

Noting that the plaintiffs in the *Hayes* case—although not those in the instant case—asserted that Article XXXIV also denies equal protection to Negroes, the court reviewed *Hunter v. Erickson* at length and concluded (App. 1, p. 7a)

> "Here, as in the *Hunter* case, the 'special burden' of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities."

The District Court added (App. 1, p. 7a):

> "The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and

the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to a referendum, for all projects except low-income housing. Some common examples, *inter alia*, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities."

DISCUSSION: THE QUESTION IS SUBSTANTIAL

This Court plainly has jurisdiction, for a three-judge court has declared a portion of a State Constitution in conflict with the federal Constitution, has declared that it "shall have no further force and effect," has enjoined State officials from relying upon it and has ordered them to act contrary to it. By virtue of these very facts, the question is a substantial one. The procedure of a three judge Court with direct appeal to this Court is summed up in *Phillips v. United States*, 312 U.S. 246, 251 (1941), "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." And where that policy is expressed in a state constitutional provision of many years' standing, it would be an extraordinary case that could deny substantiality of the issue.

Moreover, we submit that the judgment is plainly wrong. We respectfully submit that the court below has embraced the very usage of the 14th Amendment, outmoded in the 1930's, to strike down state policies incompatible with its own outlook, albeit from a different direction. And, as shown at p. 30, infra, its decision conflicts with the principles recently applied by the Fourth Circuit in *Spaulding v. Blair*, 403 F.2d 862, and by the Sixth Circuit in *Ranjel v. City of Lansing*, 417 F.2d 321, cert. denied 38 U.S.L. Week 3364.

A. Article XXXIV of the California Constitution Has No Invidious Purpose, Legitimate Reasons Motivated Its Adoption, and Legitimate Reasons Motivate Voter Treatment of Housing Projects

This case is unlike *Hunter v. Erickson*, 393 U.S. 385 (1969). There the City of Akron had a housing ordinance, enacted by its City Council, prohibiting discrimination on the basis of "race, color, religion, ancestry, or national origin", and the ordinance set up machinery to enforce its anti-discrimination provisions. The city charter was then altered by initiative for the express purpose of creating a racial classification. The charter amendment provided that any ordinance regulating use, sale, lease or other handling of real property "on the basis of race, color, religion, national origin or ancestry" required the approval of the electors before it could take effect. The charter not only repealed a fair housing ordinance aimed at racial discrimination, but it set up a classification based on race. In the words used by this Court to distinguish the situation, "there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters" (p. 389).

Nor is this case like *Reitman v. Mulkey*, 387 U.S. 369 (1967),[12] in which the initiative provision also went farther than mere repeal of state anti-racial discrimination legislation. This Court there relied upon a construction by the Supreme Court of the State, binding on this Court, that the intent of the initiative amendment was to create a constitutional right to discrimination on racial grounds (387 U.S. at 376).

Those cases and this are poles apart. Article XXXIV repeals nothing, it is not expressed in terms of race or discrimination, it had no unconstitutional motive, and it has no unconstitutional effect. It is neutral. Its sole purpose and effect are to reserve to the people in a community the right to determine whether a proposed housing project (a) is desirable and (b) justifies the financial burden. We briefly review (a) the motive or purpose, and (b) the effect.

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12. Not cited by the court below, but cited in *Hunter v. Erickson*.

1. MOTIVE OR PURPOSE OF ARTICLE XXXIV OF THE CALIFORNIA CONSTITUTION

As we have seen (pp. 8, 9, supra), the reasons presented to the voters in favor of adoption of Article XXXIV in 1950 had nothing to do with race or poverty. They were exclusively (a) political and (b) fiscal.

First as to the fiscal: Almost from its beginning public policy in California has insisted that major public indebtedness may not be incurred without approval by the voters: it has insisted that fiscal control be in the voters' hands. Thus the State Constitution provides that no city, county or school district shall incur an indebtedness or liability in any manner exceeding the income of that government for one year except with the consent of two-thirds of the voters at an election. (Art. XI, Sec. 18). This restriction was added at the Constitutional Convention of 1879 because of a groundswell of public demand produced by excessive municipal indebtedness and numerous defaulted bond issues.[13] As these controls have from time to time over the years been eluded because the words of the 1879 constitution did not fit new or ingenious devices, the public has enacted measures to preserve or regain its controls. In *Housing Authority v. Dockweiler,* 14 Cal.2d 437, 94 P.2d 794 (1939), it was held that a housing authority, although a public corporation, was not a "city or county" and therefore could incur indebtedness not subject to Article XI, Sec. 18.

It was in good part to rectify this erosion with respect to low rent public housing projects that Article XXXIV was sponsored and adopted. Appellees' Motion to Affirm asserts (at p. 5) that "No local funds are used; the cost of the program is borne completely by the federal government and by the tenants of the housing units." This is either naive or uncandid; in any event, it is erroneous. Low rent housing projects are constructed through 40-year bonds issued

13. See, for example. Van Alstyne, Arvo, "Background Study Relating to Article XI: Local Government," Calif. Constitution Revision Commission.

by the local housing authority. Although the federal government contracts to make annual contributions sufficient to pay interest and principal, the local governing body must contract to provide all municipal services for the 40 years and to waive all taxes, receiving in lieu 10% of the rentals, and the rentals are, of course, purposefully and artificially low. In consequence, the financial burden on the locality comes to 60% of what the normal tax receipts from the property would be, even on values calculated at the low rental basis. The well-known and esteemed Commonwealth Club of California, in its analysis of proposed Article XXXIV, concluded and stated in 1950 that "It is expected that value of the contributions which localities make by foregoing full ad valorem taxes on the projects occupied by low-income families, less in lieu payments which are received, will approximate 50% of the federal contribution over the life of the project."[14] Inasmuch as property tax rates have risen drastically since 1950 in march with the higher costs of providing municipal services, the burden upon the local community is now considerably greater. Literature from federal agencies and public housing agencies today refrains from making any estimate of local sharing.

In addition to the fiscal, there are many reasons, having nothing to do with race or poverty, why local voters might disapprove a particular housing project presented to them. No person knowledgeable in housing and sociology will say, in A.D. 1970, after years of experience, that public housing is *necessarily* desirable or good for minority groups or for those of low income. The issues are far more subtle. Spokesmen for the poor and for minority groups increasingly reject public housing. Whether rightly or wrongly we do not say; that is a matter on which courts may take no position. But the reasons for rejection are legitimate questions to be put directly to the voters of a community.

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14. *The Commonwealth,* Commonwealth Club of California, October 9, 1950.

Just recently the Kerner Commission (National Advisory Commission on Civil Disorders) said in its report (Bantam ed. 1968, at p. 478), that federal policies have dictated that most housing projects "be of *institutional design and mammoth* size". Yet many sound thinkers object to "institutional design" and to "mammoth size" as psychologically debilitating and sociologically oppressive. Voters may object to them on esthetic grounds or upon the ground that such projects tend to perpetuate rather than overcome racial segregation, or upon the ground that large concentrations of low-income housing creates a major change in the environment, a creation of a "central city" divorced from its surroundings. The Kerner report (p. 474) observes:

> "Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them. This can only continue to compound the conditions of failure and hopelessness which lead to crime, civil disorder and social disorganization."

The United States Department of Housing and Urban Development has said:[15]

> "Between 1937 and 1965, [Local Housing Authorities] provided low-rent housing primarily by new construction. By the 1960's, however, it was clear that new construction alone could not meet the tremendous need for decent housing at low rents . . . . *Clear too was the fact that housing developments in which all the occupants are at or near the poverty level do not make the most satisfactory environment for all low-income people.*"
>
> "To meet changing conditions, new methods were needed."

In short, public housing can have major sociological effects. Voters are entitled to a direct voice in decisions which alter the

15. HUD, Housing For Low Income Families, p. 5 (1967).

characteristics of their very environment for generations. Votes for or against a particular project find explanation in a multitude of reasons.

Appellees' motion to affirm (at p. 6) posits statistics that with "8% of the nation's poor, California has only 4% of the low income housing units" and has constructed fewer "low income units per 1000 low income family groups" than other states like New York. The source of these statistics is not given; they are not in the record. And they are meretricious. Is it being insinuated that the poor of California are not as well housed as the poor elsewhere? Is it being suggested that "low income" housing under the Housing Act of 1937 is the only housing for the poor? This kind of argument illustrates the vice of a summary judgment. *If* questions like these are relevant at all to the issue in the case, there should be a plenary trial in which a complete and factual basis for a constitutional determination can be made.

There are enough facts of which judicial notice is available to indicate that the insinuations are unsound, both as to housing for the poor elsewhere than California and the availability of other kinds of housing for the poor in California. Thus, despite the greater number of units of low income housing per 1000 constructed in New York, primarily in New York City, housing there is in crucial shortage because numerous units have become wholly uninhabitable.[16]

Moreover, other federal housing programs, conceived much later than the Housing Act of 1937, offer significant alternatives

16. A statement of Jason R. Nathan, Administrator, Housing and Development Administration, before New York State Housing Committee, November 7, 1969, states that despite New York City's "record breaking publicly-assisted construction" (p. 4) "crisis" or "disaster" is imminent in New York (p. 1) because of "the amount of housing draining out from the bottom of the reservoir", twice as many units being abandoned as constructed (p. 4). Barron's National Business and Financial Weekly, March 16, 1970, states that nearly 100,000 rental units in New York City have become uninhabitable within the last three years. Mr. Nathan states that 500,000 units are on the way out (p. 5).

to the massive institutional housing project. One of them is the leased housing-rent subsidy plan.[17] As stated by the Department of Housing and Community Development of the State of California, the "leasing program provides the machinery by which existing vacant dwellings within a community may be leased by its local housing authority at prevailing rents and then subleased to a low income senior citizen or families at rents within their financial reach." [18] California has a higher proportion of subsidized leased housing than any other state. It has taken the lead in this new form of low income housing thought by many to be more enlightened. "[A]bout one-third of the total leased units for the nation are in California. * * * The impact of the leasing program has been significant in California."[19] For example, the San Jose Housing Authority has nearly 2,000 leased units (Lockfeld Affidavit). Under the leased housing-rent subsidy plan the Housing Authorities lease, for terms up to five years, existing housing in the community—ideally and generally geographically distributed through the community—from private owners and then sub-lease it to families of low-income, providing a subsidy in the rental based on the income of the tenant. About 23,000 of such units were authorized in California (since the inception of the program in late 1965).[20]

Another alternative to the institutional housing project is the rent supplement program.[21] Under that program (12 U.S.C. § 1701s), housing is privately built, owned and managed by non-profit, limited dividend or cooperative organizations with

17. HUD, Housing Assistance Administration, Housing for Low-Income Families (1967); HUD, FHA, The Leasing Program for Low-Income Families (1967).

18. Annual Report, 1969, Department of Housing and Community Development of the State of California, p. 22.

19. Ibid, p. 23.

20. Ibid, p. 22.

21. HUD, The Rent Supplement Program for Low-Income Families (1968)

FHA mortgage financing at market interest rates. Rent supplements are furnished directly by contract between FHA and owner-developer for those tenants who qualify under income standards in the federal law.[22]

Although these alternatives are also administered by local authorities, the Attorney General of California has given his opinion that they do not require voter approval under Article XXXIV of the California Constitution;[23] leased units and privately-owned houses whose tenants receive rent supplements are not developed, constructed, or acquired by the Housing Authority.

Under Section 236 of the National Housing Act, 12 U.S.C. § 1715 z-1, in 1968 a still newer program of direct interest subsidies to lenders on privately constructed homes is authorized for those families of qualifying low-income, to keep monthly payments for housing, including taxes and insurance, to 25% of income.

We note these various methods of meeting the need for low-cost housing, not to suggest that one is better than another, but to say that voters may legitimately think so, wholly divorced from racial prejudices, and it is reasonable to let them be heard at the polls. Voters may well believe, on grounds unrelated to race or poverty, that other programs are more eligible from the standpoint of public and community interest than a mammoth, unitary project, and therefore exercise their right under Article XXXIV to disapprove such a project. And there is not a scrap of evidence in the record to suggest that reasons of race and

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22. President Johnson has said of these programs:

> "The most crucial new instrument in our effort to improve the American city is the rent supplement . . . a program of rent supplements for low-income families . . . provides a brand new approach to meet an ancient and long-neglected need."

HUD, "The Rent Supplement Program for Low Income Families".

23. 47 Ops.Cal.Atty.Gen. 17 (1966).

poverty have entered into the adoption of Article XXXIV or the action taken by the electorate under it.

In sum, Article XXXIV is a wholly neutral provision which bears no resemblance in purpose or effect to the measures struck down in *Reitman v. Mulkey* and *Hunter v. Erickson.*

2. HOW ARTICLE XXXIV OF THE CALIFORNIA CONSTITUTION HAS IN FACT OPERATED

The voters have exercised their power in favor of—not against—the project on over ⅔ of the occasions presented to them, almost as high a percentage of success as school bond issues have enjoyed in California.[24] The opinion below states (App. 1, p. 3a) that only 52% of low-income housing units submitted to the voters throughout California in the first 18 years during which Article XXXIV has been in effect have been approved by the voters. This conclusion was drawn from a document entitled "Public Housing Referenda Thru June 14, 1968" and footnoted "Source: California Department of Housing and Community Development, August 8, 1968."[25] What the document actually shows is that, while 52% of the housing *units* proposed were approved by the voters, there were 127 referenda and 69% of the *elections* resulted in votes favorable to the project.[26] Communities in which an initial referendum has been lost have voted for a project on resubmission. Communities that have

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24. A California Assembly Interim Committee on Revenue and Taxation, in a report "Taxation of Property in California", Dec. 1969, commented that "California voters have approved 75 percent of the bond issues brought to a vote since 1954-1955, a high tribute to the traditional regard in which Californians have had education". The taxpayers' revolt has greatly reduced that figure since then.

25. This document was appended to plaintiffs' "Memorandum of Points and Authorities in Support of Complaint for Declaratory and Injunctive Relief," which was filed with the complaint. We question whether it is properly part of the record, but we agree that it is accurate.

26. The disparity between the number of successful elections and the number of approved units is in part at least due to the rejection of a monstrous proposal in Los Angeles for 10,000 units.

approved projects have rejected later projects. There is no definite pattern when the elections are analyzed by years.

B. The Equal Protection Clause Does Not Preclude Reasonable Classification. Article XXXIV Makes No Classification Either on the Basis of Race or Poverty

Classifications based on race are "constitutionally suspect," *Hunter v. Erickson,* 393 U.S. 385, 392 (1969) and cases there cited. There is no such classification here. Apart from racial classification, a state created category is not in violation of the 14th Amendment if any set of facts can be rationally conceived to support it. *E.g., McDonald v. Board of Election,* 394 U.S. 802, 808-09 (1969); *McGowan v. Maryland,* 366 U.S. 420, 425-26 (1961). One who complains of a violation of the Equal Protection Clause must show that someone *comparably situated* has been treated differently. *National Union v. Arnold,* 348 U.S. 37, 41 (1954).

Appellees' Motion to Affirm would place poverty in the same category as race as a suspect classification under the Equal Protection Clause. At this point it is in order to replace words by thought. While laws may not deprive the poor of basic rights of citizens, such as the right to move from state to state,[27] or the right to vote,[28] it is a fact of life that indigency is a social, economic and political situation to which government must give its attention, or at least rightfully may do so. And to do so is not to discriminate unconstitutionally. In turning its attention to this subject, a State has wide freedom to determine what it should do and how it should do it. In permitting classification, the Equal Protection Clause allows the lawmaker to single out the need to be served or the "evil" to be eradicated and to legislate about *that* need

27. *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Edwards v. California,* 314 U.S. 160 (1941).

28. *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966) the poll tax case.

or "evil" without requiring like treatment of other matters outside the area. As Mr. Justice Holmes said in *Patsone v. Pennsylvania*, 232 U.S. 138, 144 (1914), "A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience."

Article XXXIV of the California Constitution does *not* in fact make a classification on the basis of poverty. It does, by its terms, apply only to a "low rent housing project" "for persons of low income". But to leap from that fact to a conclusion that it classifies people on the basis of poverty is quite impermissible.

With minor exceptions California treats *all* kinds of public housing alike. As stipulated, the only kind of housing any governmental agency in California provides, other than the housing to which Article XXXIV applies, is housing for state officials and university personnel. (App. 5)[29] Different treatment of housing assistance between employees of the State and all other persons is obviously a permissible classification. In short, Article XXXIV requires voter approval for *all* public housing projects sponsored by the State or its agencies and makes no classification of people for that purpose on any basis.

To say that Article XXXIV discriminates on the basis of poverty *because its subject matter is housing for persons of low income* simply ignores the fact that the only concern the State has with supplying housing is to supply it to persons of low income. There may be a *moral* duty to provide housing for those economically disadvantaged, or it may be prudent to do so as a prophylactic against social upheaval. But the Constitution imposes no command to do so, and therefore the Constitution imposes no command as to how the State is to go about determining when and if it shall do so. The subject of publicly supported housing is a subject by itself, and of its very nature it concerns those of low income.

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29. Another category consists of houses acquired as an incident to the exercise of eminent domain, which the public authority disposes of as rapidly as it can—obviously a peculiar category all its own.

But, said the court below, Article XXXIV makes it more difficult to obtain federal aid for housing than for highways, urban renewal, hospitals, education, law enforcement assistance, and model cities (App. 1, pp. 7a, 8a). To this there are three answers.

First, a classification of housing different from these matters may be a classification different in kinds of public expenditure. It is no distinction based on any forbidden criterion.

Second, a distinction as between housing and other kinds of federal aid cited by the District Court is simply not the kind of classification denounced by the Equal Protection Clause.

Third, the reference by the court below to other federal aid is a passing one without citation of statutes and without a word in the record showing what the other programs may be. If a declaration of unconstitutionality is to be based on such matters, a plenary trial instead of disposition on summary judgment would seem obviously necessary to explore the nature of these things as a basis for comparison.

Only the other day this Court rejected the claim that exemption of church property from taxation (along with non-profit hospitals, art galleries and libraries) violated the Establishment Clause of the First Amendment. *Walz v. Tax Commission,* No. 135, Oct. Term 1969, 38 U.S.L.Week 4347 (May 4, 1970). There is no report of any contention by the appellant, a private owner of real estate, that the tax exemption violated the Equal Protection Clause by classifying him differently from the exempted non-profit organizations. But this Court would have been alert to that constitutional bar if it had existed, and we submit that the classification here is no less permissible than in the *Walz* case. Highways, colleges and law enforcement are so vastly different problems from public housing that these plaintiffs cannot be said to be "comparably situated" to highway users, etc.

THE VERY FEDERAL LEGISLATION WHICH LED TO ARTICLE XXXIV ILLUMINATES THE RATIONALITY OF THE CLASSIFICATION

Article XXXIV is a response to the invitation of the Housing Act of 1937.[30] That Act extends an invitation to the States to employ the funds and credit of the United States to bear some of the cost of alleviating housing shortages. The Act several times emphasizes that *local control* is its keynote policy. §§ 1, 15(7)(a, b), 42 U.S.C. §§ 1401, 1415(7)(a, b). Thus the United States Housing Authority may not enter into a contract for preliminary loan "unless the governing body of the locality involved has by resolution approved the application . . ." (§ 15(7)(a)) or into a contract for any other loan "unless the governing body of the locality has entered into an agreement . . . for . . . local cooperation . . ." (§ 15(7)(b)). All this is required "[i]n recognition that there should be local determination of the need for low-rent housing. . . ." 42 U.S.C. § 1415(7). In 1959, Section 1 of the Act (42 U.S.C. § 1401) was amended to state:

> "It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program * * *" (Act of Sept. 23, 1959, Pub.L. 86-372, Title V, § 501; 73 Stat. 679)

Where control is to be local, where federal law emphasized that desideratum, where the basic criterion is that there be "local determination of the need for low-rent housing" before such housing may be brought into a community and a major part of the cost be placed on the community, what more appropriate or permissible than that the voice of that local determination be the people themselves?

As we have seen (pp. 7, 8, supra), just 8 months after California adopted Article XXXIV in 1950, Congress provided in 1951 in the Independent Offices Appropriation Act that the

30. Act of Sept. 1, 1937, c. 896, 50 Stat. 888, as amended, 63 Stat. 422, 429, 73 Stat. 679, 82 Stat. 504; 42 U.S.C. §§ 1401, et seq.

United States Housing Authority "*shall not* . . . authorize the construction of any projects" in any locality in which the project may be "*rejected by* the governing body of the locality or *by public vote*". Congress repeated this prohibition in the Independent Offices Appropriation Act, enacted in 1952. By the Independent Offices Appropriation Act enacted in 1953, it specified that no housing should be authorized, nor any authorized go forward, "where the people of that community, by their duly elected representatives, *or by referendum,* have indicated they do not want it."

Although these Congressional restraints were not repeated after 1953 and are not now part of the Congressional enactment, we submit that they plainly demonstrate the rationality of placing low cost housing in a category of its own peculiarly justifying a requirement of voter approval. *The closer a subdivision of the government gets to the grass roots, the more reasonable is a classification requiring voter approval,* as witness the colonial New England town meeting.

To sustain the decision below is to reject the basic teaching of constitutional law that State classification does not violate the 14th amendment if any set of facts can be conceived that rationally supports it. One need not indulge in imagination to conceive a rational basis for Article XXXIV. It was stated in the Official Arguments on which Article XXXIV was adopted in 1950. It is exemplified in the growing body of sophisticated thought about housing outlined at pp. 17-20 above.

And, surely, to reject as utterly untenable a state constitutional classification on *summary judgment,* without trial and on the most cursory affidavits, is most extraordinary conduct. A respectful regard for the American federal system—for the unique relationship between the federal authority and state authority—should not countenance that kind of summary disposition. The acknowledged paramountcy of the federal authority is universally accepted because it is sensitively applied and exercises "scrupu-

lous regard for the rightful independence of the state governments". *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500, 501 (1941).

C. The Purpose and Effect of Article XXXIV Are to Determine How State Power Shall Be Distributed by California Among Its Own Governmental Organs. Such a Provision Presents No Question Justiciable in a Federal Court

As we have seen (p. 26, supra), the federal Housing Act of 1937 was an invitation to the State to employ federal assistance upon *local determination* of its need. California accepted that invitation. Originally it did so on the basis that an administrative agency might make the necessary determinations. But the burden financially and environmentally falls on the local citizens. Therefore by Article XXXIV of the Constitution, California accepts the invitation now only on the basis that *the people themselves* determine the need and the desirability for low-rent housing in their communities. That determination by California does not implicate the Constitution of the United States in any manner. The sovereignty of a State rests in its people. The manner in which they distribute or parcel out its exercise is not a federal justiciable question. *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *Hughes v. Superior Court*, 339 U.S. 460, 466-67 (1950). They may retain all or any part of it in their own hands, as by the initiative or referendum. *Pacific Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Granting some or all of that exercise of sovereignty to legislative bodies, state or local, they may retain or resume the remainder. As this Court said in *Highland Farms Dairy v. Agnew*, supra, at 612:

> "The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. . . . How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."

And this is true even should it be true that, in practice, the State's decision may make it more difficult for any particular group within the State to obtain the advantages it desires, so long as the decision is grounded in neutral principle, as is Article XXXIV. *Hunter v. Erickson,* 393 U.S. 385 (1969). True, *Hunter v. Erickson* tells us that a "legislative structure which otherwise would violate the Fourteenth Amendment" is not immunized by popular referendum (p. 392). But that is not this case. Here it is not claimed that anything violates the Fourteenth Amendment except the provision for referendum itself! *Hunter v. Erickson* also tells us that the "sovereignty of the people is itself subject" to the constitutional limitation on the State. That principle, as *Hunter v. Erickson* itself applies it, reaches a rearrangement of the distribution of legislative powers on racially discriminatory lines. That is not this case either.

The plaintiffs' case here is a stupefying reversal of history. The initiative and referendum were borne of an urge to curb the power of the wealthy and entrenched so as to benefit the disadvantaged. Yet, now, they are attacked and enjoined as working to the disadvantage of the disadvantaged! To embark on the task of analyzing different forms of governmental structure to the end of determining which is more likely to be equally attuned to the demands or needs of all the groups in which the citizenry falls—and in one way or another everyone is a member of some minority—would call for divine wisdom. For a court to embark on that task and to utilize the 14th Amendment to redistribute the legislative powers of a state is to open up an unpredictable future. Today taxpayers in revolt may vote down bond issues that a timorous city council, subjected to the "confrontation" of pressure groups, would vote. Tomorrow legislative bodies may stand in the way of measures for which today's youth, then grown to maturity, will vote behind the privacy of the curtain of the polling booth. The Equal Protection Clause has been invoked and applied to protect and expand the people's right to vote, *Reynolds v. Sims,*

377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 633 (1969); now it has been invoked and applied below to deny the right to vote. This, we submit, is a misapplication.

In two recent cases Courts of Appeals have been called upon to consider state referendum statutes which came far closer than does Article XXXIV to violating the principles of *Hunter v. Erickson* and *Reitman v. Mulkey*. In each case the State's decision to submit a proposal to referendum was upheld against a charge of violation of Equal Protection. *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968); *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), cert. denied 38 U.S.L. Week 3364 (Mar. 16, 1970).

In *Spaulding v. Blair*, plaintiffs were Negroes who sought to prevent the submission of an open-housing amendment to referendum. Speaking for the court, Judge Sobeloff said, 403 F.2d at 864,

> "No contention is made that a state may not constitutionally apportion its legislative power between elected representatives of the people and the people themselves. Nor is it suggested that Chapter 385, if approved by the voters, would be unconstitutional. In these circumstances, it must be concluded that a federal court is without power to enjoin a valid state legislative procedure."

In the *Ranjel* case, there was a petition for a referendum upon an ordinance rezoning a 20-acre site from one-family residential to a community unit plan, which would permit the construction of 250 low-rent housing units by a private developer using HUD funds. The plaintiffs, poor black and Mexican-Americans, sought to enjoin the referendum. The District Court granted an injunction. Citing *Hunter v. Erickson*, *Reitman v. Mulkey*, and *Spaulding v. Blair*, the Court of Appeals reversed. It said, 417 F.2d at 324,

> "Initiative and referendum is an important part of the state's legislative process. Being founded on neutral principles, it should be exempt from Federal Court constraints."

These, we submit, are the principles that control this case. They were completely overlooked by the court below.

It is well to return to the language of the Equal Protection Clause of the 14th Amendment:

> "No state * * * shall * * * deny to any person within its jurisdiction the equal protection of the laws."

As a matter of explicit English direction, this prescribes that, regardless of who makes the law, it shall operate alike on all in like situation. It asserts nothing about how laws shall be made unless the very manner of their making *indubitably and inevitably* works a discrimination in their operation. *That is not this case.*

CONCLUSION

We submit that the question presented by this appeal is substantial, that, if any summary disposition is to be made of this appeal, it should be a summary order of reversal, and that the very least that should be done is to note jurisdiction and deny the motion to dismiss or affirm.

Dated, San Francisco, California, June 3, 1970.

Respectfully submitted,

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(Appendices Follow)

Appendix 1

The United States District Court
Northern District of California

Filed—Mar 23 1970
C. C. Evensen, Clerk

Anita Valtierra, et al., *Plaintiffs,* vs. The Housing Authority of the City of San Jose, et al., *Defendants.*	NO. 52076
Gussie Hayes, et al., *Plaintiffs,* vs. Housing Authority of San Mateo, *Defendant.*	NO. C-69-1-RFP

Before HAMLIN, Circuit Judge, and PECKHAM and LEVIN, District Judges.

PECKHAM, District Judge:

This matter comes before this Court on plaintiffs' motions for summary judgment, their applications for an injunction, and defendants' motions to dismiss. Plaintiffs ask that we declare Article XXXIV of the California State Constitution[1] to be unconstitutional and request that we forbid defendants from relying upon it as a reason for not requesting federal assistance with which to finance

1. ARTICLE XXXIV
PUBLIC HOUSING PROJECT LAW
§ 1. Approval of electors; definitions
Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the

low-income housing. We hold Article XXXIV to be unconstitutional. *Hunter v. Erickson*, 393 U.S. 385 (1969).

Title 42 U.S.C. § 1983 creates a cause of action for the deprivation, under color of state law, of any right, privilege or immunity guaranteed by the United States Constitution. In this case, the non-federal defendants are acting under color of Article XXXIV in not requesting federal assistance. Equal protection cases brought to remedy discrimination against the poor (*e.g., Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969)), have long been entertained under § 1983. Jurisdiction to hear this case is conferred upon this Court by 28 U.S.C. §1343(3), (4).

This case is required to be heard by a three-judge court by 28 U.S.C. §§ 2281, 2284, as plaintiffs seek an injunction enjoining defendant local officials from enforcing a state constitutional provision (see *A.F.L. v. Watson*, 327 U.S. 582 (1946)) on the ground of its repugnance to the Equal Protection Clause.

Two cases are consolidated for consideration. The first is *Valtierra v. Housing Authority of San Jose*, No. 52076. The parties

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case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

plaintiff are "persons of low income," who have been determined to be eligible for public housing, and have been placed on the appropriate waiting lists. They are unable to occupy public housing because at present none is available. The second case, *Gussie Hayes, et al. v. Housing Authority of San Mateo,* No. C-69-1-RFP, is consolidated with the first because of the identity of the legal issue, and is brought by similarly situated poor persons, predominately Negro, on the waiting list for public housing in San Mateo County.

Plaintiffs have demonstrated that Article XXXIV has impeded the financing of new housing, only 52% of the referenda submitted to the voters have been approved, even though they cannot of course demonstrate that any particular named plaintiff would be able to occupy new housing if such housing were built. In Santa Clara County, the voters defeated the referendum seeking permission to obtain housing funds in 1968, and in San Mateo County two similar referenda were defeated in 1966. Housing Director Wemen, in San Mateo County, feels it would be fruitless to attempt another referendum at present. [Affidavit J to *Hayes* complaint.] Plaintiffs' position is that but for the existence of Article XXXIV, local housing authorities would be able to apply for federal assistance if they chose; they further submit that there is evidence that in fact they would so choose. [See *Valtierra* complaint p. 8].

There are three groups of defendants in the *Valtierra* case: the Housing Authority of the City of San Jose, a public entity, and its members in their official capacity; the City Council of San Jose, a public entity, and its members, in their official capacity; and the Department of Housing and Urban Development and its Secretary, George Romney. All three groups have filed responsive pleadings. There is only one defendant in the *Hayes* case, the Housing Authority of San Mateo County. The Court notes that this defendant has not made an appearance in the case, but rather has chosen to stand mute.

The federal defendants, the Department of Housing and Urban Development (HUD), and its Secretary, George Romney, move

for dismissal on the ground that, as to them, the *Valtierra* complaint does not state a claim upon which relief can be granted. Fed.R.Civ.P. Rule (12)(b)(6). The complaint does not seek any relief against the federal defendants; their joinder is not necessary in order to grant the relief that is requested. Therefore this Court ORDERS that their motion for dismissal be granted. Accordingly, the federal defendants are dismissed from this lawsuit. The *Hayes* case does not involve any federal defendants.

The two non-federal defendants in the *Valtierra* case, viz., the Housing Authority of San Jose, and the City Council of San Jose, raise several pleas in abatement which do not preclude this Court from reaching the merits of plaintiffs' constitutional claim. First, defendants contend that because Calafornia could decline to participate in the program established by the Housing Act of 1937, that California can participate on any condition. This is not the case. Certainly a condition that no Negro could occupy such low-income housing would be unconstitutional. Second, they assert that referenda are not subject to constutional scrutiny. This is not the law. *Hunter v. Erickson, supra.* Third, defendants erroneously believe plaintiffs are asking this Court to compel the Housing Authorities to seek federal funding. However, plaintiffs only seek an injunction forbidding the named local officers from relying on Article XXXIV as a reason for not requesting such funds. There may be any number of reasons, quite apart from Article XXXIV why the Housing Authorities might not wish to seek federal funds at any given point in time.

We find plaintiffs' Supremacy Clause argument to be unpersuasive and therefore do not decide the case on that ground. Plaintiffs' Privileges and Immunities argument is not reached as this Court decides the case on Equal Protection grounds.

PLAINTIFFS' EQUAL PROTECTION ARGUMENT

The starting point for this argument is the now well-established standard that classifications based on race are "constitutionally sus-

pect," *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and those based on property "traditionally disfavored," *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). Both bear a far heavier burden of justification than other classifications. *See, McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

The gravamen of plaintiffs' Equal Protection claim is that the express discrimination in Article XXXIV, as it applies only to "low-income persons", brings it squarely within the ban of a long line of Supreme Court decisions forbidding the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective. *E.g., Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Carrington v. Rash*, 380 U.S. 89 (1965); *Baxtrom v. Herrold*, 383 U.S. 107 (1966); and *Rinaldi v. Yeager*, 384 U.S. 305 (1966). As characterized by the Court in *McLaughlin v. Florida*, 379 U.S. at 191:

> Judicial inquiry under the Equal Protection Clause, . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question . . . whether there is an arbitrary or invidious discrimination between those classes covered . . . and those excluded.

It is no longer a permissible legislative objective to contain or exclude persons simply because they are poor. *Edwards v. Calif.*, 314 U.S. 160 (1941); *Shapiro v. Thomson*, 394 U.S. 618 (1969). *Cf., Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956).

In addition to asserting that Article XXXIV denies equal protection of the laws to persons who are poor, the *Hayes* plaintiffs assert that it also denies equal protection to those who are Negro. Although Article XXXIV does not specifically require a referendum for low-income projects which will be predominantly occupied by Negroes or other minority groups, the equal protections clause is violated if a "special burden" is placed on those groups by the operation of the challenged provision, if "the reality is that the law's impact falls on the minority." *Hunter v. Erickson, supra*, at 391.

Thus, last term, the Supreme Court in *Hunter v. Erickson, supra*, applied to the housing area the constitutional requirement for equal protection. In that case, the Supreme Court invalidated an amendment to the City Charter of Akron, Ohio, which required a referendum before anti-discrimination legislation could be enacted. The Court held this to be impermissible, stating that it violated the Equal Protection Clause for at least three reasons:

First, only laws designed to end housing discrimination were required to run the gauntlet of a referendum, and the state cannot make it more difficult to enact legislation on behalf of one group than on behalf of others. The *Hunter* court speaking through Mr. Justice White states, 393 U.S. at 390-91:

> It is true that the section [requiring a referendum before action may be taken] draws no distinction among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But § 137 [requiring the referendum] nevertheless disadvantages those who would benefit from laws barring racial . . . discrimination as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual, or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.

Second, the law's impact falls on minorities, resulting in an impermissible burden which constitutes a substantial and invidious denial of equal protection.

> "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on

the ballot [citation omitted], § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others. [citations omitted] 393 U.S. at 391."

Lastly, the court noted, 393 U.S. at 392:

> . . . [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. [Citations omitted.] The sovereignty of the people is itself subject to . . . constitutional limitations. . . .

Here, as in the *Hunter* case, the "special burden" of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities.[2] The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to a referendum, for all projects except low-income housing. Some common examples,

2. That minority groups comprise "the poor" is increasingly clear. In his affidavit, Mr. Franklin Lockfeld, Senior Planner for the Santa Clara County Planning Department stated: "The low-income areas are closely related to the areas of concentration of minority residents and high income areas are closely related to the nearly all white sections of the community. . . . In 1960, only 5% of the units occupied by white-non-Mexican-Americans were in delapidated or deteriorated condition, while 23% of the units occupied by Mexican-Americans and 20% of the units occupied by non-whites were in delapidated or deteriorated condition. Minorities were thus over represented in the less than standard housing by greater than four to one, and occupied nearly one-third of the deteriorating and delapidated housing in the County in 1960."

inter alia, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. Further, even though federal assistance for state housing agencies is a privilege which California need not seek at all, the requirements of equal protection must still be met. *U.S. v. Chicago, M., St.P. & P. R.R.*, 282 U.S. 311, 328-29 (1931); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v. Thomson, supra.*

Defendants argue that Article XXXIV does not violate the Equal Protection Clause because it was not the product of unconstitutional motivations. However, although proof of bad motive may help to prove discrimination, lack of bad motive has never been held to cure an otherwise discriminatory scheme. Certainly *Hunter* does not demand a demonstration of improper motivation.

Accordingly, plaintiffs' motions for summary judgment, declaring Article XXXIV to be unconstitutional, and their applications for an injunction are granted.

IT IS SO ORDERED.

/s/ O. D. HAMLIN
United States Circuit Judge

/s/ ROBERT F. PECKHAM
United States District Judge

/s/ GERALD S. LEVIN
United States District Judge

Appendix 2

In the United States District Court

Northern District of California

Gussie Hayes, Diane Hayes, Carolyn Hayes, Cathy Hayes, Tommy Hayes, Barbara Hayes, Danny Hayes (by their general guardian, Gussie Hayes), Iota Weatherwax, Carroll Peil, Lawrence Peil, Mary Peil, Donna Peil, Robert Weatherwax (by their general guardian, Iota Weatherwax), Jo-Brown, Karen Jackson, Kevin Jackson, Kenneth Jackson (by their general guardian, Jo-Ann Brown), Shirley Mae Luke, Sylvester Jones (by his general guardian, Shirley Mae Luke), on their own behalf and on behalf of all persons similarly situated,

Plaintiffs,

vs.

The Housing Authority of San Mateo County, a public entity; William G. Weman, individually and as Executive Director of the Housing Authority of San Mateo County; Benjamin Ichinose; Ben Albrecht; Perry A. Bygdnes; Raymond Rucker; and James A. Tassos, individually and as Commissioners of the Housing Authority of San Mateo County,

Defendants.

Civil Action
No. C-69-1 RFP

Anita Valtierra, Irene Valtierra, Jenny Valtierra, Robert Valtierra, Carol Valtierra, Cecilia Valtierra, Bertha Valtierra, Anthony Valtierra, Dorether Anderson, Dale Robert Anderson, Judy Lea Anderson, John Lee Anderson, Della Anderson, Jeff Alexander Anderson, Dolores Anderson, Gwendolyn Anderson, Thomas Anderson, Angie Duarte, Pauline Duarte, Jesus Duarte, Alfred Duarte, Eddie Duarte, all on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

The Housing Authority of the City of San Jose, a public entity; Rodmar H. Pulley, individually and as Executive Director of the Housing Authority of the City of San Jose; Mary R. Boyce, individually and as Chairman of the Board of Commissioners of the Housing Authority of the City of San Jose, Walter Rector, individually and as Vice-Chairman of the Board of Commissioners of the Housing Authority of the City of San Jose; David Reiser; Allen Bellandi; and Sam Obregon, individually and as Commissioners of the Housing Authority of the City of San Jose; The City Council of the City of San Jose; Ronald James, individually and as Mayor of the City of San Jose; Virginia C. Shaffer; Joseph Colla; Walter V. Hayes; David G. Goglio; and Kirk Gross, individually and as Councilmen for the City of San Jose; United States Department of Housing and Urban Development; George Romney, individually and as Secretary of the Department of Housing and Urban Development,

Defendants.

Civil Action No. 52076

Order Granting Plaintiffs' Motion for Summary Judgment; Declaratory Judgment and Permanent Injunction

The above entitled matters having heretofore been consolidated for all purposes and the motions of plaintiffs for summary

judgment having been presented and the Court being full advised, and having considered the pleadings, motions and affidavits, and after hearing oral arguments, and the Court having determined that there is no genuine issue of material fact,

The Court finds that the plaintiffs in both causes are entitled to summary judgment as a matter of law.

Therefore it is ORDERED, ADJUDGED and DECREED that:

A. The motions of plaintiffs for summary judgment in their favor are granted;

B. Article XXXIV of the California Constitution is declared unconstitutional and shall have no further force and effect for the reasons set forth in this Court's opinion filed March 23, 1970;

C. The defendants, The Housing Authority of San Mateo County, a public entity; William G. Weman, individually and as Executive Director of the Housing Authority of San Mateo County; Benjamin Ichinose; Ben Albrecht; Perry A. Bygdnes; Raymond Rucker and James A. Tassos, individually and in their official capacities as Commissioners of the Housing Authority of San Mateo, their successors in office, agents, servants, employees and attorneys and all other persons in active concert or participation with them be and hereby are permanently restrained and enjoined from abiding by or relying upon Article XXXIV as a reason for not requesting state or federal assistance with which to finance low income housing;

The defendants, The Housing Authority of the City of San Jose, a public entity; Rodmar H. Pulley, Mary R. Boyce, Walter Rector, David Reiser, Allen Bellandi and Sam Obregon, in their official capacities; the City Council of the City of San Jose, Ronald James, Virginia C. Shaffer, Joseph Colla, Walter V. Hays, David J. Goglio, Kurt Gross, in their official capacities; their successors in office, agents, servants, employees and attorneys and all other persons in active concert or participation with them, be and hereby are permanently restrained and enjoined from

abiding by or relying upon Article XXXIV as a reason for not requesting state or federal assistance with which to finance low income housing.

Dated: April 2, 1970.

/s/ O. D. HAMLIN
United States Circuit Judge
/s/ ROBERT F. PECKHAM
United States District Judge
/s/ GERALD S. LEVIN
United States District Judge

Appendix 3

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The United States District Court
Northern District of California

Anita Valtierra, et al., *Plaintiffs,* vs. The Housing Authority of the City of San Jose, et al., *Defendants.*	No. 52076
Gussie Hayes, et al., *Plaintiffs,* vs. Housing Authority of San Mateo, *Defendant.*	No. C-69-1-RFP

NOTICE OF APPEAL

Notice is hereby given that Ronald James, Virginia C. Shaffer, Joseph Colla, Walter V. Hays, David J. Goglio, Kurt Gross, and Norman Y. Mineta, defendants, hereby appeal to the Supreme Court of the United States from the declaratory judgment entered

in this action on April 2, 1970, and from the permanent injunction issued and entered on said date.

This appeal is taken pursuant to Title 28, Section 1253 of the United States Codes.

Dated: April 6, 1970

FERDINAND P. PALLA
City Attorney

By RICHARD W. MARSTON
Richard W. Marston
Deputy City Attorney

Appendix 4

EXTRACT FROM 1950 BALLOT PAMPHLET PUBLISHED BY SECRETARY OF STATE

10 PUBLIC HOUSING PROJECTS. REQUIRING ELECTION TO ESTABLISH. Initiative Constitutional Amendment. Adds Article XXXIV to Constitution. Requires approval of majority of electors of county or city, voting at an election, as prerequisite for establishment of any low-rent housing project by the State or any county, city, district, authority, or other state public body. Defines low-rent housing project as living accommodations for persons of low income financed or assisted by Federal Government or state public body. Exempts any project subject to existing contract betwen state public body and Federal Government. YES ☐ NO ☐

Analysis by the Legislative Counsel

This constitutional amendment prohibits the development, construction, or acquisition of any low-rent housing project by the State, or any city, city and county, county, district, authority, agency or other subdivision or public body of the State until approved by a majority vote of the electors of the city, town, or county in which the project is to be located.

"Low-rent housing project" is defined as any development composed of urban or rural dwellings, apartments, or other living accommodations for persons of low income, financed in whole or in part by the United States or any of its agencies or instrumentalities, or by the State or any of its agencies or public bodies, or to which the Federal Government or the state public body extends assistance by supplying labor, guaranteeing the payment of liens, or otherwise, except where a contract for financial assistance between any state public body and the Federal Government in respect to such project is in existence on the effective date of the amendment.

"Persons of low income" means persons or families who lack the income necessary (as determined by the state public body developing, constructing, or acquiring the project) to enable them without financial assistance to live in decent, safe, and sanitary dwellings, without overcrowding.

The amendment would be self-executing, but legislation to facilitate its operation may be enacted.

Argument in Favor of Initiative Proposition No. 10

A "YES" vote for this proposed constitutional amendment is a vote neither for nor against public housing. It is a vote for the future right to say "yes" or "no" when the community considers a public housing project.

Passage of the "Public Housing Projects Law" will restore to the citizens of a city, town, or county, as the case may be, the right to decide whether public housing is needed or wanted in each particular locality. Such is not the case at present.

Time after time within the past year California communities have had public housing projects forced upon them without regard either to the wishes of the citizens or community needs. This is a particularly critical matter in view of the fact that the long-term, multimillion-dollar public housing contracts call for tax waivers and other forms of local assistance, which the Federal Government says will amount to HALF the cost of the federal subsidy on the project as long as it exists.

For government to force such additional hidden expense on the voters at a time when taxation and the cost of living have reached an extreme high is a "gift" of debatable value. It should be accepted or rejected by ballot.

If, on the other hand, certain communities are in such dire need of housing that the cost of long-term subsidization is deemed

worth while, local voters, who best know that need, should have the right to express their wishes by ballot.

In either case, a "YES" vote for this proposed amendment will strengthen local self-government and restore to the community the right to determine its own future course.

Furthermore, the financing of public housing projects is an adaptation of the principle of the issuance of revenue bonds. Under California law, revenue bonds, which bind a community to many years of debt, cannot be issued without local approval given by ballot. Public housing and its long years of hidden debt should also be submitted to the voters to give them the right to decide whether the need for public housing is worth the cost.

A "YES" vote for the "Public Housing Projects Law" is a vote for strong local self-government. It is an expression of confidence in the community's future and in the democratic process of government. To strengthen the grass roots democracy which has made America protector of the world's free peoples, vote "YES" on the Public Housing Projects Law.

EARL DESMOND
State Senator, Sacramento County
FREDERICK C. DOCKWEILER

Argument Against Initiative
Proposition No. 10

This proposition should be defeated because: (1) it is wholly unnecessary; (2) it is contrary to firmly established principles of American representative government; (3) if adopted, it would be impossible to act expeditiously in times of emergency; (4) it would substantially increase the tax load in cities and counties of the State.

There is no necessity for a constitutional amendment such as here proposed, prohibiting the development, construction and acquisition of low-rent housing projects without submission of

the issue to the vote of the people in general or special elections to be held for the particular purpose in each city, town, or county of the State. This would be time-consuming and expensive. (A single special election in the City of Los Angeles would cost $400,000.) The total cost to taxpayers of the State for holding special elections would be staggering.

California now has an adequate statute relating to the subject—"The California Housing Authorities Law, Act 3483"—which provides that no low-rent housing project can be undertaken "until the governing body of the city or county * * * approves said project by resolution duly adopted." This law was passed in 1938 and has been amended several times.

If the proponents of this measure desire to change the legal procedure for local approval of low-rent housing projects, they should make their recommendations to the Legislature and ask for amendment of the law rather than freeze into the State Constitution (already too voluminous) provisions relating to local governmental administrative procedure.

The people already have adequate control through election of their representatives in the State Legislature, city councils, and boards of supervisors, and through the exercise of the initiative, referendum and recall.

This proposed measure is an attempt to discourage the construction of new low-rent housing projects (in which veterans have preference) by setting up a slow, cumbersome and costly procedure to make use of federal funds that would in any event be expended in other states without in any way benefiting taxpayers of California.

In a national emergency it may become necessary to quickly provide housing for industrial workers in certain areas. In the event of an atomic bomb attack emergency housing would have to be provided immediately for local residents. Elected representatives of the people in the State Legislature, in city councils

and boards of supervisors should be free to act promptly to meet pressing needs in any contingency, rather than be placed in a legal straitjacket.

This proposed constitutional amendment is not in the public interest. Vote NO on Proposition No. 10.

CHRIS N. JESPERSEN
State Senator, Twenty-ninth District
C. J. HAGGERTY, *Secretary*
California State Federation of Labor
(A. F. of L.)
FLETCHER BOWRON, *Mayor*
of the City of Los Angeles

Appendix 5

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United States District Court
Northern District of California

Anita Valtierra, et al.,
Plaintiffs,
vs.
The Housing Authority of the City of San Jose, et al.,
Defendants.

Civil Action No. 52076

STIPULATION OF FACT

IT IS HEREBY STIPULATED by and between the attorneys for the plaintiffs and the municipal defendants herein that the following facts are true and are not controverted herein:

No type of housing is owned or leased by any state public body of the State of California (i.e., by any non-federal public entity in California) for residential purposes other than housing for rental to persons of low income, as such persons are defined by Article 34 of the California Constitution, except the following:

(1) Housing owned or leased by the Regents of the University of California, or by the State Colleges of California, for rental to students, faculty and certain administrative officers. Such hous-

ing, although mostly rent subsidized, is not available for occupancy by the public at large, and it is made available without regard to the income or the estate of the prospective occupant;

(2) Housing owned by various, non-federal public entities acquired incidentally by negotiation or eminent domain proceedings for non-housing, public works purposes (such as street widenings, highway construction, parks, school construction, sewer and drain line construction, and other public works projects) which housing is often rented by said entities on a month-to-month, temporary basis either to the former owners, to tenants of the former owners, to local housing agencies for subletting to persons of low income or directly by such entities to persons of low income until such time as the destruction or other removal of such housing is necessary to complete said public works projects; and

(c) Housing for employees of State institutions such as State hospitals and prisons, for employees of State parks or historical monuments, and the Governor's mansion.

Dated: Nov 26 1969

FERDINAND P. PALLA,
City Attorney

By RICHARD W. MARSTON
Richard W. Marston

Attorneys for municipal defendants

/s/ DIANE V. DELEVETT
Attorney for plaintiffs